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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 9

RALPH D. ABERNATHY, CLYDE CARTER, WILLIAM S. COFFIN, JR., JOSEPH CHARLES JONES, BERNARD S. LEE, JOHN DAVID MAGUIRE, GAYLORD B. NOYCE, FRED L. SHUTTLESWORTH, GEORGE SMITH, DAVID E. SWIFT and WYATT TEE WALKER,

Petitioners,

v.

ALABAMA.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ALABAMA

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

Opinion Below

The opinion of the Court of Appeals of Alabama in *Abernathy* v. *Alabama* (R. 237) is reported at 155 So. 2d 586. The Court of Appeals rendered no opinion in the other ten cases but affirmed the convictions on the authority of the *Abernathy* case (R. 288, 329, 372, 666, 415, 458, 499, 541, 583, 624).

Jurisdiction

The judgment of the Court of Appeals of Alabama in each of these cases was entered on October 23, 1962 (R. 236, 288, 329, 372, 666, 415, 458, 499, 541, 583, 624). Rehearing was denied on November 20, 1962 (R. 248, 289, 330, 373, 667,

416, 459, 500, 542, 584, 625). The Supreme Court of Alabama denied certiorari on July 25, 1963 (R. 254).

The jurisdiction of this Court in each of these cases is invoked pursuant to Title 28, United States Code, Section 1257(3), petitioners having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

Statutory and Constitutional Provisions Involved

Each of these cases involves Article I, Section 8 (commerce clause) and Article VI, paragraph 2 (supremacy clause), of the Constitution of the United States. Each case also involves the First and Fourteenth Amendments.

Each petitioner was convicted under Code of Alabama, Title 14, Section 407 (1958):

> If two or more persons meet together to commit a breach of the peace, or to do any other unlawful act, each of them shall, on conviction, be punished, at the discretion of the jury, by fine or imprisonment in the county jail, or hard labor for the county, for not more than six months.

Every petitioner except Walker was also convicted under Code of Alabama, Title 14, Section 119(1) (Supp. 1961):

> Any person who disturbs the peace of others by violent, profane, indecent, offensive or boisterous conduct or language or by conduct calculated to provoke a breach of the peace, shall be guilty of a misdemeanor, and upon conviction shall be fined not more than five hundred dollars ($500.00) or be sentenced to hard labor for the county for not more than twelve (12) months, or both, in the discretion of the Court.

Each case also involves Title 49, United States Code, Section 316(d):

> . . . It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, region, district, territory, or description of traffic, in any respect whatsoever; or to subject any particular person, port, gateway, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: . . . .

Questions Presented

I. Were petitioners denied due process of law under the Fourteenth Amendment in that their criminal convictions for breach of the peace and unlawful assembly were based on no evidence of guilt?

II. Were petitioners' rights under the due process clause of the Fourteenth Amendment denied because their convictions for breach of the peace and unlawful assembly were based on state statutes which, as construed and applied, are vague, indefinite, and uncertain?

III. Did the arrest and conviction of petitioners on charges of breach of the peace and unlawful assembly constitute enforcement by the state of the practice of racial segregation in bus terminal facilities serving interstate commerce, thus violating petitioners' rights under the equal protection clause of the Fourteenth Amendment, the commerce clause, and 49 U. S. C. §316(d)?

IV. Were the petitioners denied their rights under the due process clause of the Fourteenth Amendment, as that clause incorporates the First Amendment's protection of freedom of expression, assembly, and religion?

V. Were the petitioners denied their rights under the supremacy clause of the Constitution in that the courts of Alabama tried and convicted petitioners on charges which a United States District Court had already determined were intended to perpetuate racial segregation?

Statement

In the spring of 1961 a wave of civil rights demonstrations known as "Freedom Rides" swept the south. Their purpose was to demonstrate to the country that Negro travelers very often did not enjoy equal rights secured by the law (R. 36, 185). The "Freedom Riders" were in a number of places greeted with violence, intimidation and arrest. Seven of the petitioners in the case at bar were "Freedom Riders" (R. 185). The remaining four petitioners sat with the seven, their friends, at a lunch counter in the Trailways Bus Terminal in Montgomery, Alabama (R. 188).

Petitioners were arrested and convicted for (1) conduct calculated to provoke a breach of the peace (Ala. Code, Tit. 14, §119(1) (Supp. 1961)) and (2) unlawful assembly (Ala. Code, Tit. 14, §407 (1958)). Five petitioners, William S. Coffin, Jr., University Chaplain of Yale University, John Maguire, Professor of Religion at Wesleyan University, Professor Gaylord Noyce of Yale University, David Swift, Professor of Religion at Wesleyan University, all of whom are white, and George Smith, law student at Yale University, a Negro, left New Haven, Connecticut for New York on May 23, 1961 (R. 180-82, 184). From New York they took a flight to Atlanta, Georgia and spent the night

in Atlanta (R. 182, 184). The following morning they took the Greyhound Bus to Montgomery, Alabama (R. 184). The five were joined in this trip by petitioners Clyde Carter and Joseph Charles Jones, theological students from North Carolina, both of whom are Negroes (R. 184). All seven arrived in Montgomery on Wednesday, May 24th (R. 184).

Upon arrival they proceeded directly to the home of petitioner Rev. Ralph D. Abernathy (R. 206). Although there was a large crowd gathered when they arrived at the Greyhound Bus Terminal, there was very little disturbance as they drove from the Terminal to his home (R. 206). The next morning, Thursday, May 25th, the seven decided to go on to Jackson, Mississippi (R. 184) and were accompanied to the Trailways Bus Terminal by petitioners Abernathy, Wyatt Walker, Fred Shuttlesworth, all ministers, and Bernard Lee, a theological student; all of these petitioners are Negroes (R. 186). By prearrangement they contacted the state military authorities before leaving (R. 143). Petitioners were escorted by heavily armed state military convoy to the rear of the Trailways Bus Terminal, where they were ushered into the white waiting room by military guards standing at the door (R. 186). Upon entering the white waiting room petitioners planning to travel to Jackson immediately went to the ticket window and purchased tickets (R. 188). Petitioner Walker went to make a phone call (R. 131). After the tickets were purchased, several of the petitioners sat down at the lunch counter located in the white waiting room (R. 188). Sheriff Mac Sim Butler thereupon arrested petitioners because he was instructed to do so by Colonel Poarch, Staff Judge Advocate, 31st Division of the Alabama National Guard (R. 91, 96).

At the time of arrest, according to Sheriff Butler, some four to five hundred persons were outside the terminal and, not counting the petitioners, approximately 30 persons were

inside—12 of whom were law enforcement officials (R. 84). Butler did not ask the petitioners to leave or to refrain from any alleged provocative conduct, nor did he hear anyone else ask the petitioners to leave (R. 103). He did not see petitioners engage in obscene, boisterous, or indecent conduct (R. 105, 106). And he knew that two previous "Freedom Rider" groups had used the facilities of the terminal without being arrested (R. 102).

On the day of the petitioners' arrests, Rev. Abernathy, along with several others, instituted an action seeking to enjoin the arrest of persons using interstate transportation facilities in Montgomery on a desegregated basis (R. 35, 36). The Attorney General of Alabama and the Circuit Solicitor for the Fifteenth Judicial Circuit (encompassing Montgomery) were defendants (R. 35). Immediately after their arrests, the other ten petitioners filed a motion to intervene in the federal court action, which was granted May 26, 1961. *Lewis* v. *Greyhound Corp.*, 199 F. Supp. 210, 213. Petitioners sought an injunction against the state court criminal proceedings arising out of their arrest, but Judge Johnson dismissed the action as to the arrests of petitioners on the ground that 28 U. S. C. §2283 "precludes the granting of such relief." He stated:

> . . . I want you to understand that the court does not find or believe that the arrest of these individuals against whom these criminal proceedings are now pending was for any purpose other than to enforce segregation. As a matter of fact, in the posture of the case, the court is of the opinion that the arrest of those individuals was for the purpose of enforcing segregation in these facilities (R. 14).

At petitioners' trial, Sheriff Butler testified that a riot had occurred when the first group of "Freedom Riders"

arrived in Montgomery, May 20, 1961. On the day following, May 21, 1961, the Governor declared martial law (R. 86). That same day a hostile, predominantly white crowd of well over a thousand persons congregated near the church of petitioner Abernathy (R. 89).

Floyd Mann, the Director of Public Safety for the State of Alabama, testified that on Saturday, May 20th, when the first group of Freedom Riders arrived, he saw fist fights between members of the press and private persons and between white and colored persons (R. 121). Between the date of the first riot and the arrest, a Negro minister was shot (R. 124). However, when the petitioners arrived at the Trailways Terminal, there were at least a hundred or more soldiers outside the terminal as well as thirty-five members of Mann's department along with several motorcycle officers of the local police department (R. 129). The Director of Public Safety was of the opinion that the crowd outside the terminal was under control at the time of the arrest (R. 130).

Colonel Poarch estimated the number of persons within the terminal at thirty-five to fifty and the crowd outside at three hundred (R. 139, 140). After the military had escorted petitioners to the terminal, he noticed three white "toughs" pouring coffee on the seats of the luncheon counter. As they were not interstate or intrastate travelers, he ordered them out of the station, but he did not arrest them even though their conduct was in his opinion, "calculated to provoke a breach of the peace" (R. 140, 147). Poarch thought it was necessary to arrest the petitioners "Because, as I have stated, the air was electric with excitement and tension, there were three hundred people outside the station who were hostile to these persons." But he admitted that he had not attempted to determine the mood of the crowd outside (R. 154).

General Graham of the Alabama National Guard ordered Colonel Poarch to order the arrest of the petitioners because they were acting contrary to community custom (R. 219). He also testified that there were several hundred military personnel on duty outside the terminal (R. 228).

After the arrest Sheriff Butler swore out a warrant and affidavit which alleged that each petitioner

> . . . did disturb the peace of others by violent, profane, indecent, offensive or boisterous conduct or language or conduct calculated to provoke a breach of the peace in that he did come into Montgomery, Alabama, which was subject to martial rule *and did wilfully and intentionally attempt to test segregation laws and customs* by seeking service at a public lunch counter with a racially mixed group, during a period when it was necessary for his own safety for him to be protected by military and police personnel and when the said lunch counter building was surrounded by a large number of hostile citizens of Montgomery (emphasis supplied) (R. 1).

and that each petitioner

> . . . did meet with two or more persons to commit a breach of the peace or to do an unlawful act, against the peace and dignity of the State of Alabama. (*Ibid.*)

The eleven petitioners were tried and convicted on September 15, 1961, in the Court of Common Pleas of Montgomery County for both breach of the peace and unlawful assembly (R. 3). Walker was sentenced to 90 days in jail, and the others were sentenced to 15 days in jail with fines of $100 and costs (R. 594).

An appeal was taken to the Circuit Court of Montgomery County[1] where the petitioners were tried on the basis of the Solicitor's Complaint which charged that each petitioner[2]

> . . . did disturb the peace of others in Montgomery, Alabama, at a time when said city and county were under martial rule as a result of the outbreak of racial mob action, by conduct calculated to provoke a breach of the peace, *in that he did wilfully and intentionally seek or attempt to seek service at a public lunch counter with a racially mixed group,* at which time and place the building housing said lunch counter was surrounded by a large number of hostile citizens of Montgomery, Alabama, and it was necessary for his own safety for him to be protected by military and civil police personnel (emphasis supplied), (R. 4).

and that each petitioner

> . . . did meet with two or more persons to commit a breach of the peace or to do an unlawful act, in that he did meet with two or more persons in Montgomery, Alabama, at a time when said city and county were under martial rule as a result of the outbreak of racial mob action, *for the purpose of wilfully and intentionally seeking or attempting to seek service at a public lunch counter with a racially mixed group* at which time and place the building housing said lunch counter was surrounded by a large number of hostile citizens of Montgomery, Alabama, and it was necessary for his

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[1] Under Alabama procedure, trial in the Circuit Court is de novo, and proceedings are begun by a Solicitor's Complaint (Ala. Code, Tit. 15, §363) (1958).

[2] In the Circuit Court petitioner Walker was charged only with unlawful assembly (R. 594).

> own safety for him to be protected by military and police personnel, against the peace and dignity of the State of Alabama (emphasis supplied)" (*Ibid.*).

The eleven cases were consolidated for trial, but a separate judgment was entered in each (R. 81). Each petitioner was convicted, fined $100 and sentenced to 30 days at hard labor (R. 234). Appeal was taken to the Court of Appeals of Alabama. Only the *Abernathy* record contained the transcript of trial in the Circuit Court, but pursuant to stipulation (R. 59) the Court of Appeals considered the transcript a part of the record in each of the other cases. The Court of Appeals, by a two to one decision, affirmed each judgment of conviction and rehearing was denied. Judge Cates, in dissent, stated that the State failed to prove beyond a reasonable doubt a "clear and imminent danger of breach of the peace," because there was no proof to his satisfaction that the sitting down at the lunch counter caused the crowd to gather. Nor was there any evidence of an assault upon a militiaman (R. 246). The Supreme Court of Alabama denied certiorari (R. 254).

The Trailways Bus Terminal in Montgomery is "leased by several interstate carriers including Capitol Motor Lines and is subleased by them to an 'agent,' R. E. McRae, executive official of Capitol Motor Lines. The lunch counter portion of the terminal is leased by the . . . carriers to the Interstate Co., a Delaware Corporation, which in turn leases the lunch counter portion of the terminal to Southern House, Inc., which operates the lunch counter portion of the terminal . . ." (R. 61).

Summary of Argument

The convictions of the petitioners for breach of the peace and unlawful assembly were based on no evidence of guilt. Petitioners were at all times polite, quiet, and peaceful. There is no evidence of any wrongdoing on their part. A breach of peace conviction cannot be sustained merely because hostile observers are present. As the convictions for breach of the peace must fail for lack of evidence, so too must the convictions for unlawful assembly based on the alleged breach of the peace.

The breach of the peace and unlawful assembly statutes, as construed and applied to petitioners, are unconstitutionally vague. The breach of the peace statute afforded petitioners no fair warning that it proscribed their acts. As applied to petitioners the statute punishes constitutionally protected conduct, and allows the police unfettered discretion to determine when an offense has been committed. For the same reasons the unlawful assembly statute, as construed and applied, deprives petitioners of due process of law.

The act of police and military authorities of escorting petitioners to the terminal and then arresting them without warning constitutes an entrapment.

Petitioners were arrested to enforce the state's custom of segregation. Their right to use the facilities of the terminal free of state enforced racial discrimination was protected by the commerce clause and 49 U. S. C. §316(d), as well as by the Fourteenth Amendment. Therefore the decision of the lower court cannot stand.

The conviction of the petitioners of breach of the peace and unlawful assembly conflicts with previous decisions of this Court protecting the right of freedom of expression,

assembly, and religion. The petitioners believed in the right of all persons to travel without discrimination; while peacefully expressing this belief they were arrested. Their protest is constitutionally protected and therefore their convictions must fail.

In *Lewis* v. *Greyhound Corp.*, 199 F. Supp. 210, Judge Johnson determined that petitioners were arrested to enforce the state's custom of segregation. Since that determination was made prior to the trial of the petitioners in the state Circuit Court, the state court was estopped from reaching a different conclusion.

ARGUMENT

I. Petitioners' Criminal Convictions Were Based on No Evidence of Guilt.

A. *Breach of the Peace*

The Solicitor's Complaint filed in the Circuit Court of Montgomery charged, under Title 14, Section 119(1) of the Alabama Code, that each petitioner engaged in "conduct calculated to provoke a breach of the peace, in that he did wilfully and intentionally seek or attempt to seek service at a public lunch counter with a racially mixed group. . . ". However, "It is settled beyond question that no state may require racial segregation of interstate or intrastate transportation facilities. The question is no longer open; it is foreclosed as a litigable issue." *Bailey* v. *Patterson*, 369 U. S. 31; *Boynton* v. *Virginia*, 364 U. S. 454; *Gayle* v. *Browder*, 352 U. S. 903.

The State argued that the use of the facilities by petitioners in the "explosive" situation that existed in Montgomery was an abuse of the petitioners' constitutional rights and therefore subject to criminal sanctions. It in-

troduced testimony that hostile observers presented a threat of violence (R. 117, 139), that violence had occurred within the previous week (R. 84, 85), that the air was electric with excitement (R. 141), that a few white "toughs" had poured coffee on the counter seats (R. 140), that an "outburst" was heard when petitioners sat down (R. 105), and that military and civilian authorities believed that arrests were necessary to preserve the peace (R. 141, 147). However, this evidence even when viewed most favorably to the State, did not establish that petitioners had committed a breach of the peace.

The breach of the peace statute, Tit. 14, §119(1), condemns conduct which disturbs the peace of others and is "'violent, profane, indecent, offensive or boisterous" or "calculated to provoke a breach of the peace." The State did not contend that petitioners were violent, profane, or in any way offensive (R. 105). Nor did the testimony elicited by the State support its contention that the sitting of petitioners at the lunch counter either disturbed the peace of anyone or was calculated or designed to provoke a breach of the peace.

Although violence had ensued upon the arrival of the first group of Freedom Riders on May 20th, two groups of Freedom Riders used the facilities of the Trailways terminal without interference from the police on the day before petitioners' arrests (R. 102). The petitioners were provided with an armed military escort to the terminal (R. 185). Approximately eighteen soldiers inside and over one hundred outside controlled the crowd which, under the most generous estimates, did not exceed five hundred (R. 129, 84). With the exception of an alleged "outburst" (R. 105), there was not a single incident of violence or unruly conduct outside the terminal.

In these circumstances, petitioners were justified in believing that their right to request service at the lunch counter would be protected. The record establishes without contradiction that petitioners were orderly at all times and innocent of any wrongful conduct. They were not warned to remain away from the counter. When they sat down, they were not even asked to withdraw, but were summarily arrested.

Thus the conviction of petitioners for breach of the peace is based on no evidence of guilt and *Thompson* v. *Louisville,* 362 U. S. 199, applies. Mere evidence that the presence of peaceful Negro and white persons sitting at a lunch counter might move onlookers to commit acts of violence is insufficient to support a conviction for breach of the peace. *Barr* v. *City of Columbia,* —— U. S. ——, 12 L. ed. 2d 766.

Even assuming that a volatile situation did exist, petitioners cannot be punished for the innocent assertion of fundamental constitutional rights. "[T]he possibility of disorder by others cannot justify exclusion of persons from a place if they otherwise have a constitutional right (founded upon the Equal Protection Clause) to be present." *Wright* v. *Georgia,* 373 U. S. 284, 293. See also *Cooper* v. *Aaron,* 358 U. S. 1, 27; *Buchanan* v. *Warley,* 245 U. S. 60; *Garner* v. *Louisiana,* 368 U. S. 157; cf. *Watson* v. *City of Memphis,* 373 U. S. 526, 535 ("constitutional rights may not be denied simply because of hostility to their assertion or exercise").

B. *Unlawful Assembly*

Title 14, Section 407 of the Alabama Code makes it a crime when "two or more persons meet together to commit a breach of the peace, or to do any other unlawful act. . . ." Clearly, there is no evidence that petitioners

met together to commit a breach of the peace, as that term is normally understood.[3] Petitioners were at all times orderly and did no more than exercise an undisputed constitutional right. Moreover, there is no evidence whatever of the commission of any other unlawful act. Thus the applicability of *Thompson* v. *Louisville, supra,* seems undeniable.

For the same reasons that the breach of peace conviction must fall, the convictions for unlawful assembly are vulnerable. There simply is no evidence of wrongdoing. As this Court said in *Barr* v. *City of Columbia,* —— U. S. ——, 12 L. ed. 2d 766, 769:

> . . . [T]he only possible relevant evidence which we have been able to find in the record, is a suggestion that petitioners' mere presence seated at the counter might possibly have tended to move onlookers to commit acts of violence. . . . [B]ecause of the frequent occasions on which we have reversed under the Fourteenth Amendment convictions of peaceful individuals who were convicted of breach of the peace because of acts of hostile onlookers, we are reluctant to assume that the breach-of-peace statute covers petitioners' conduct here.

See also *Garner* v. *Louisiana,* 368 U. S. 157; *Taylor* v. *Louisiana,* 370 U. S. 154; *Wright* v. *Georgia,* 373 U. S. 284.

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[3] The Alabama Court of Appeals' expansion of the meaning of "breach of the peace" is challenged *infra,* Argument II, as a denial of due process of law.

II. The Conviction of the Petitioners on the Basis of State Statutes Which, as Construed and Applied, Are Vague, Indefinite, and Uncertain, Violates the Petitioners' Rights Under the Due Process Clause of the Fourteenth Amendment.

A. *Breach of the Peace*

The breach of the peace statute which was the basis for the conviction of petitioners provides in part:

> Any person who disturbs the peace of others by violent, profane, indecent, offensive or boisterous conduct or language or by conduct calculated to provoke a breach of the peace, shall be guilty of a misdemeanor . . . (Ala. Code, Tit. 14, §119(1) (Supp. 1961)).

In affirming petitioners' convictions the Alabama Court of Appeals held, "No specific intent to breach the peace is essential to a conviction for a breach of the peace. . . . Nor is it necessary to constitute the offense of a breach of the peace that the proof show the peace has actually been broken . . . (R. 245). This holding is contrary to the plain language of §119(1). No Alabama decisions were cited in support of this construction of the statute and, indeed, there were none.[4]

The Court of Appeals also held that petitioners' convictions could be sustained without any proof of "violent, profane, indecent, offensive or boisterous" conduct (R. 246). However, the phrase "conduct calculated to provoke

[4] The only Alabama case approaching a construction of the 1959 statute (Tit. 14, §119(1)) is *Mitchell* v. *State*, 41 Ala. App. 254, 130 So. 2d 198 (Ala. App. 1961), cert. denied, 130 So. 2d 205 (Ala. Sup. Ct.). In that case a conviction was reversed because the complaint, which alleged merely that the defendant engaged in "conduct calculated to provoke a breach of the peace," was held to be too vague.

a breach of the peace" is extremely difficult to define, and criminal statutes should be construed narrowly. Any interpretation of that phrase that is not closely related to the types of conduct specifically described is both unreasonable and unforeseeable.

Criminal laws must explicitly define crimes sought to be punished so as to give fair notice as to what acts are prohibited. As was held in *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453, "no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what crimes are forbidden." See also *United States* v. *L. Cohen Grocery*, 255 U. S. 81, 89; *Connally* v. *General Const. Co.*, 269 U. S. 385; *Raley* v. *Ohio*, 360 U. S. 423.

Section 119(1), as construed and applied, did not afford petitioners fair warning. Petitioners did not actually disturb the peace of others, as a sound reading of the statute would require, nor is there any proof that they intended to do so. Moreover, it was neither alleged nor proven that petitioners were "violent, profane, indecent, offensive or boisterous." Disregarding the fact that petitioners were engaged in innocent conduct, the Court of Appeals of Alabama upheld their convictions by a broad and indefinite expansion of the phrase "conduct calculated to provoke a breach of the peace."

Petitioners had no way of knowing that the statute would be extended to include their actions. The statute as narrowly drawn by the Legislature, lulled them "into a false sense of security." *Bouie* v. *City of Columbia*, —— U. S. ——, 12 L. ed. 2d 894, 899. To allow this construction of the act to cover conduct which a normal reading of it would not reveal as being violative of its provisions, would be like applying a new act retroactively.

> There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language. As the Court recognized in *Pierce* v. *United States,* 314 U. S. 306, 311, "judicial enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness." *Id.* at 899.

Not only did the court surprise defendants by giving the law a new and broad construction, it also gave the act an interpretation of undue elasticity. The statutory language "conduct calculated to provoke a breach of the peace" can now be used to justify conviction for entirely innocent conduct whenever others threaten to act unlawfully in response to that conduct. Where a statute is so vague and uncertain as to make criminal an utterance or an act which may be innocently said or done with no intent to induce resort to violence, a conviction under such a law cannot be sustained. *Herndon* v. *Lowry,* 301 U. S. 242.

Thus, "this case falls within the rule that a generally worded statute which is construed to punish conduct which cannot constitutionally be punished is unconstitutionally vague to the extent that it fails to give adequate warning of the boundary between the constitutionally permissible and constitutionally impermissible applications of the statute." *Wright* v. *Georgia,* 373 U. S. 284.

B. *Unlawful Assembly*

The same reasoning and authorities apply to the convictions for unlawful assembly. Count 2 of the Solicitor's Complaint charges that petitioners "did meet with two or

more persons to commit a breach of the peace or to do an unlawful act . . ." As the petitioners were charged under the alternative words of the statute, they cannot know whether the State claims that they met to commit a breach of the peace or met to commit some other unlawful act. Assuming for sake of argument, as the petitioners were convicted of a breach of the peace, that the gravamen of the crime charged to the petitioners is that they met to commit a breach of the peace, the conviction for unlawful assembly still cannot be sustained. Normally breach of the peace, as is evident from the original affidavit filed by the sheriff (R. 1) and the complete text of the breach of the peace statute in Alabama, refers to "violent, profane, indecent, offensive or boisterous conduct." There were no prior constructions of this statute which would have placed the petitioners on notice that the statute applied to innocent activity which might provoke others to unlawful acts of opposition. Certainly the text of the statute would not inform petitioners that it was subject to such a construction.

If it is assumed that the gravamen of the petitioners' crime was that they met to commit some unlawful act, then the conviction certainly must fall. At all times the acts of the petitioners were constitutionally protected and therefore not subject to criminal sanctions. The charge of meeting to commit any unlawful act fails to provide any warning that a legally and Constitutionally protected activity—sitting in an integrated group at a lunch counter—can be punished as unlawful.

If either of the statutory clauses is unconstitutionally vague, the conviction under it must be reversed for it cannot be known which part was relied upon by the trial or appellate courts. *Stromberg* v. *California,* 283 U. S. 359; *Thomas* v. *Collins,* 323 U. S. 516; *Williams* v. *North Carolina,* 317 U. S. 287.

C. *Entrapment*

Moreover, the conviction of the petitioners on both charges is further impaired by the fact that their acts were induced by the authorities. Petitioners were escorted to the terminal by the military authorities. They were allowed to purchase their tickets and to use the "white" waiting room. They were not warned that their subsequent act of using the facilities of the lunch counter would provoke the crowd outside to violence. Nor were they asked to leave the counter after they sat down. The military authorities' attitude and actions manifested absolute control of the situation both inside and outside the terminal. For the police and military authorities to induce, suggest, or tacitly approve conduct, and then deem it illegal is in the nature of an entrapment. *Sherman* v. *United States,* 356 U. S. 369. It "offends a sense of justice," *Rochin* v. *California,* 342 U. S. 165, 173, to allow prosecution to follow in such a situation. "To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal." *Sherman* v. *United States, supra.* It is clear that in the instant case the court below has so drawn the line as to include the innocent petitioners who were at all times engaged in constitutionally protected conduct.

III. The Arrests and Convictions of Petitioners Constitute Enforcement by the State of the Practice of Racial Segregation in Bus Terminal Facilities Serving Interstate Commerce, in Violation of the Equal Protection Clause of the Fourteenth Amendment, and 49 U. S. C. §316(d), and a Burden on Commerce in Violation of the Commerce Clause.

Petitioners were arrested to enforce the state "custom" of segregation. Judge Johnson so concluded in *Lewis* v. *Greyhound Corp.*, 199 F. Supp. 210 (M. D. Ala. 1961), and the record here is clear. The testimony of Sheriff Butler and General Graham leads unquestionably to the conclusion that the law enforcement officials' act of arresting the petitioners was part and parcel of the pre-existing state practice of racial segregation. Both indicated in their testimony that the motivating factor in the decision to arrest petitioners was that the petitioners dared challenge the state "custom" of segregation.[5] And certainly it stretches

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[5] At the trial of the petitioners in the Circuit Court, Sheriff Mac Sim Butler, when asked on cross-examination whether or not he had seen the petitioners do anything, testified:

> A. Yes, sir, I did. I saw them do something that I thought might cause a riot.
>
> Q. What was it? A. They came in as a mixed crowd and immediately sat down and ordered coffee at a white lunch counter. At that time they were arrested (R. 97).

Later in the cross-examination, counsel questioned the sheriff about the warrant which was the basis of conviction of the petitioners in the lower court.

> Q. And just one other question about the warrant. You further say in this warrant he did wilfully and intentionally attempt to test the segregation laws and customs by seeking service at a public lunch counter with a racially mixed group. As the chief law enforcement officer of this county, sir, can you tell us what particular laws you had in mind, if any? A. I don't know what particular code it would be, but I am sure, lawyer, that you know our lunch stands, cafes and other places are segregated (R. 106). *(continued)*

the limits of credulity to explain the arrest of peaceful persons whereas the white "toughs" who poured the coffee on the seats of the counter were merely removed from the station without charges being brought against them.

There can be no question that petitioners were within their rights in seeking service at the bus terminal lunch counter. *Bailey* v. *Patterson*, 369 U. S. 31; *Boynton* v. *Virginia*, 364 U. S. 454; *Browder* v. *Gayle*, 352 U. S. 903; *Taylor* v. *Louisiana*, 370 U. S. 154. A state cannot require eating establishments to segregate or enforce its own policy of segregation by prosecution of those who would challenge segregation. *Peterson* v. *Greenville*, 373 U. S. 244; *Lombard* v. *Louisiana*, 373 U. S. 267. Where interstate transportation facilities are involved, the state's intrusion is particularly indefensible. As in *Wright* v. *Georgia*, the command of General Graham to arrest the petitioners was doubly a violation of petitioners' Fourteenth Amendment rights:

> It was obviously based, according to the testimony of the questioning officers themselves, upon their intention to enforce racial discrimination in the park. For this reason the order violated the Equal Protection Clause of the Fourteenth Amendment . . .

General Graham, who ordered the arrest of the petitioners, when asked why he so acted testified as follows:

> Q. What was it, General, that led you to conclude that these defendants should be arrested? A. Well, it was the act of sitting together as a group contrary to the custom, long established custom here in this community under the circumstances.
>
> Q. What custom had you in mind, General Graham? A. White people eat one place and colored eat another, which is a long established custom pretty well recognized by both parties here in Montgomery.
>
> Q. And it was the violation by these defendants of that custom? A. Under these circumstances (R. 219).

> The command was also violative of petitioners' rights because as will be seen, the other asserted basis for the order—the possibility of disorder by others—could not justify exclusion of the petitioners from the park (373 U. S. at 292).

This use of the state's machinery also conflicts with the statute forbidding discrimination in facilities operated by interstate motor carriers, 49 U. S. C. §316(d); *Boynton* v. *Virginia, supra,* and constitutes an unlawful burden on commerce in violation of Article I, Section 8 of the Constitution, *Morgan* v. *Virginia,* 328 U. S. 373.

IV. The Decision Below Conflicts With Decisions of This Court Securing the Fourteenth Amendment Right to Freedom of Expression, Assembly and Religion.

The decision below contravenes petitioners' rights of freedom of expression, assembly and religion. Their act of sitting together at the lunch counter in the Trailways Terminal, was an expression of their moral and religious belief that segregation is inconsistent with the Christian ethic (R. 183). It was an entirely peaceful demonstration of this view as well as an attempt to secure a cup of coffee. It thus falls within the protection of the First Amendment. *Garner* v. *Louisiana,* 368 U. S. 157; *Burstyn* v. *Wilson,* 343 U. S. 495; *NAACP* v. *Alabama,* 357 U. S. 449; *Thornhill* v. *Alabama,* 310 U. S. 88.

The conduct of petitioners is analogous to the acts of the defendants in *Garner* v. *Louisiana,* who were convicted of disturbing the peace for conducting a peaceful sit-in at a white lunch counter. Recognizing the breadth of the First Amendment, Justice Harlan, concurring, wrote:

> We would surely have to be blind not to recognize that petitioners were sitting at these counters, where they knew they would not be served, in order to demonstrate that their race was being segregated in dining facilities in this part of the country. Such a demonstration, in the circumstances of these two cases, is as much a part of the "free trade" in ideas . . . thought of as speech.
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> • • • • •
>
> If the act of displaying a red flag as a symbol of opposition to organized government is a liberty encompassed within free speech as protected by the Fourteenth Amendment, *Stromberg* v. *California*, 283 U. S. 359, the act of sitting at a privately owned lunch counter with the consent of the owner, as a demonstration of opposition to enforced segregation, is surely within the same range of protections (368 U. S. at 201, 202).

And see *Edwards* v. *South Carolina*, 372 U. S. 229; *Fields* v. *South Carolina*, 375 U. S. 44; *Henry* v. *Rock Hill*, —— U. S. ——, 12 L. Ed. 2d 79.

V. The Court Below Deprived Petitioners of Due Process and Violated the Supremacy Clause by Refusing to Accept the Federal District Court Determination That Petitioners Were Arrested to Enforce Racial Segregation.

Judge Johnson, in a case involving all of the parties in this case and the incident involved here, *Lewis* v. *Greyhound Corp.*, 199 F. Supp. 210 (M. D. Ala. 1961), concluded as a matter of fact that petitioners were arrested to enforce the state's custom of segregation.[6] Although he so concluded he refused to grant petitioners' motion to enjoin the criminal prosecutions in the state courts. The state court, completely ignoring Judge Johnson's conclusion, convicted petitioners of breach of the peace and unlawful assembly. The refusal of the trial court to admit the determination by Judge Johnson that petitioners were arrested to enforce the state custom of segregation violated petitioners' rights under the due process clause of the Fourteenth Amendment, and the supremacy clause (Article VI) of the United States Constitution. If the arrest of the petitioners was to enforce the state's custom of segregation, this would be, even in the state courts, a complete defense to the charges. *Boynton* v. *Virginia, supra; Wolfe* v. *North Carolina,* 364 U. S. 177, 197 (dissenting opinion of Chief Justice Warren). The essential question is, therefore, whether or not the state courts were estopped from reaching a different conclusion as to the reason for the arrest of the petitioners.

The Restatement of Judgments, Section 68(1), on the question of collateral estoppel states: ". . . where a question of fact essential to the judgment is actually litigated

[6] The Federal Court record was introduced at trial and is a part of the record on file in this Court although it was not printed in this Court.

and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action." Nor is it important that the proceedings were criminal in nature. Although the rule was originally developed in connection with civil litigation, it has been widely used by the state and federal courts in criminal cases. See *Hoag* v. *New Jersey*, 356 U. S. 464. As was said by this Court in *Yates* v. *United States*, 354 U. S. 298, 335, "the doctrine of collateral estoppel is not made inapplicable by the fact that this is a criminal case, whereas the prior proceedings were civil in character." The judgments and decrees of a federal court are entitled to the same force and effect, so far as *res judicata* and collateral attack are concerned, as would be accorded the judgment of record of a state court under similar circumstances. *Bigelow* v. *Old Dominion Copper Co.*, 225 U. S. 111.

In *Southern Pacific Railroad* v. *United States*, 168 U. S. 1, Justice Harlan reviewed the decisions of this Court on the doctrine of *res judicata*. His opinion summarizes the governing law in this case:

> The general principle announced in numerous cases is that a right, question, or fact, distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. *Id.* at 48.

The fact that the state rather than private persons was involved is unimportant. A federal court judgment which

operates as a bar against a subsequent suit in the state court as to private parties would operate as a bar against the state as well. *Deposit Bank* v. *Board of Councilmen of Frankfort,* 191 U. S. 499.

Thus the factual determinations of the federal court in *Lewis* v. *Greyhound Corp., supra,* precluded the state court from reaching a different conclusion.

CONCLUSION

WHEREFORE, for the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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